UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF
Anderson Excavating Company **Case 14-CA-156092**

and

International Union of Operating Engineers Local 571

BRIEF IN SUPPORT OF EXCEPTIONS

The decision by the Administrative Law Judge in this case is fundamentally flawed, as the Administrative Law Judge has essentially used Anderson Excavating's position in an action United States District Court for Nebraska that the Union separately commenced against Anderson Excavating, to punish Anderson Excavating for attempting to defend itself, while that same United States District Court action remained pending. Aside from lack of support for certain evidentiary conclusions, such as whether or not the purported 2014-2018 Heavy Highway Agreement was ever actually transmitted to Anderson Excavating, the claim was time barred because it was filed more than six months after Anderson Excavating's repudiation and the claimed unfair labor practice derived from statements made during deposition, which are considered privilege.

I. 10(B) LIMITATION DEFENSE

In the present case, the Amended Charge averred that since "May 20, 2015", Anderson Excavating had "withdrawn recognition and repudiated the parties' collective-bargaining agreement". (First Amended Charge). The First Amended charges asserted that Anderson committed a violation "by stating that it was not bound by agreement that is effective by its

terms from June 1, 2014 through May 20, 2018" and by "stating that it was not bound by the terms and conditions of the collective bargaining agreement". The evidence reflects that Virgil Anderson, the former President of Anderson Excavating, and Virginia Anderson, provided deposition testimony on May 20, 2015 in the action that was then pending before the United States District Court for the District of Nebraska in a case brought against Anderson Excavating by International Union of Operating Engineers Local 571.

The Administrative Law Judge determined that Anderson Excavating had committed an unfair labor practice by "stating that it is not bound" by the 2014-2018 Heavy Highway Agreement. The entire basis of what Anderson Excavating stated on May 20, 2015 was set forth in the depositions of Virgil and Virginia Anderson. A review of Virginia Anderson's deposition reflects that she was never asked a single time whether or not Anderson Excavating was bound by the 2014-2018 Heavy Highway Agreement. Indeed the phrase, "2014-2018 Heavy Highway Agreement" does not even appear in Virginia Anderson's deposition. At page 42 of Virginia Anderson's deposition the following colloquy appears:

"Q. In this case, the answer contends that there is no written collective bargaining agreement 5 between Anderson and the Local Union 571?

A. That there is no contract, that's right.

Q. Okay. Prior to that, are you aware of any other time where the -- where Anderson has advised the local union that there is no collective bargaining agreement between the two?

A. No."

The very question posed by the Union's counsel was predicated upon the understanding that the "Answer" which had been filed in 2014 had denied there was no collective bargaining agreement. How can it suddenly be new or a surprise to the Union that Anderson Excavating is

denying it is bound by a collective bargaining agreement when the very question asked by the Union serving as the basis of the claim is predicated upon an Answer filed in 2014, well more than six months before the filing of either the original Charge or the Amended Charge?! Virginia Anderson did not say anything new or surprising to the Union on May 20th. Rather, Virginia Anderson merely reaffirmed what had been stated in Anderson Excavating's Answer to the Union's Complaint filed in May 2014, well before six (6) months prior to any charge by the Union in 2015 (or 2016, when the Amended Charge was filed).

Similarly, a review of Virgil Anderson's deposition reflects he was never questioned about the alleged 2014-2018 Heavy Highway Agreement. Virgil Anderson was never asked whether that agreement was effective. Indeed, the Union's counsel did not even bring up the 2014-2018 Heavy Highway Agreement let along make it an exhibit to show to Virgil Anderson. Given the absence of the discussion, how could the Administrative Law Judge conclude that Anderson Excavating stated that "it is not bound by the agreement"?

With respect to Virgil Anderson's deposition not only was the 2014-2018 Agreement never even referenced, but the Union's counsel again re-affirmed that the Union understood by virtue of Anderson Excavating's position in the litigation that it was contending it was not bound by any collective bargaining agreement. A page 27, beginning at line 23, there is the following question and answer:

"Q. Okay. In the answers to interrogatories and the response -- or the answer to the complaint, the position has been that there is no contract between Anderson and Local 571, are you aware of that?

A. There probably is not."

How can it suddenly be a surprise for the Union that Anderson is purportedly repudiating its obligations on May 20th, when the questions are predicated upon the "answer to the complaint" and the "answers to interrogatories" that Anderson Excavating had given in 2014?

Anderson Excavating alleged in its Answer to the Amended Charge that the Charge and Amended Charge were barred by the six month statute of limitations. See also 29 United States Code §160(b)("Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.").

The Amended Charge asserts that the violation occurred by stating it was not bound by the collective bargaining agreement. As noted above, Anderson Excavating never stated that it was not bound by the 2014-2018 collective-bargaining agreement, because it was never asked. The Union's position in the pending federal court litigation was that a 2004-2006 collective bargaining agreement continued in effect due to an evergreen clause. Aside from the fact that it was not asked about the specific agreement alleged in the Amended Charge, even if it is broadened to include any collective bargaining agreement, it was apparent that Anderson Excavating was taking that position in the federal district court litigation. Even the Union attorney's deposition questions reflect he was aware of that position by virtue of his reference to both Virgil and Virginia Anderson to the position taken in the "Answer" which was filed on May 16, 2014.

Essentially the Amended Charge is asserting that Anderson repudiated its obligations under a collective bargaining agreement. It is recognized, however, that "a repudiation need not

be an express, written repudiation but instead can be manifested in a variety of ways." NLRB v. Jerry Durham Drywall, 974 F.2d 1000, 1004 (8th Cir. 1992). Certainly, filing an Answer which states "The Collective Bargaining Agreement the action is based upon terminated on April 30, 2006, and is therefore no longer a valid agreement" is a manifestation of a repudiation. Indeed, how could Anderson Excavating's position be more unequivocal than in an Answer to a lawsuit filed in federal district court? Certainly, any confusion was surely eliminated when the Union's counsel signed a Rule 26(f) report and filed it with the United States District Court on June 17, 2014, containing the recognition that "Defendant claims the Collective Bargaining Agreement is not a valid contract" and that "The Collective Bargaining Agreement remained in effect until April 30, 2006. There is not an automatic renewal provision contained in the Collective Bargaining Agreement. Therefore, the Collective Bargaining Agreement terminated on its expiration date." (Rule 26[f] Report at page 3).

It has also been recognized that if a repudiation occurred outside the 10(b) period, all subsequent failures to honor the terms of a collective bargaining agreement are consequences of the initial repudiation. *See, e.g.*, St. Barnabas Med. Ctr., 343 N.L.R.B. 1125, 1127 (2004). It has also been observed that an employer's repeated repudiations of a multi-employer association contract constitute neither an unfair labor practice nor give rise to a cause of action with a separate limitation period. *See* NLRB v. Serv-All Co. Inc., 491 F.2d 1273, 1275 (10th Cir. 1974); NLRB v. McCready and Sons, Inc., 482 F.2d 872, 874-876 (6th Cir. 1973); and NLRB v. Field and Sons, Inc., 462 F.2d 748, 750 (1st Cir. 1972).

"When there is notice of a clear and unequivocal repudiation, the continuing violation theory no longer applies and a party is required to file its unfair labor practice charge within six months of receipt of such notice. NLRB v. Jerry Durham Drywall, 974 F.2d 1000, 1005, 1992

U.S. App. LEXIS 21000, *14, 141 L.R.R.M. 2213, 124 Lab. Cas. (CCH) P10,563 (8th Cir. 1992). The fact that Anderson Excavating gave unequivocal notice is demonstrated by the Answer and the very litigation giving rise to the depositions, upon which the Union based its charge. There was no continuing violation. Notice was unequivocal no later than the date of filing of Anderson Excavating's Answer and the Charge filed more than six months after that date should have been determined to be time barred.

II. THE LITIGATION PRIVILEGE SHOULD PRECLUDE ACTION BASED UPON DEPOSITION TESTIMONY.

Various courts have recognized a privilege associated with deposition testimony which protects a deponent from claims based upon such deposition testimony. *See, e.g.,* Del Fuoco v. O'Neill, 2011 U.S. Dist. LEXIS 14607; *see also* Moore v. Conliffe, 7 Cal. 4th 634, 871 P.2d 204, 29 Cal. Rptr. 2d 152, 1994 Cal. LEXIS 1823, 94 Cal. Daily Op. Service 3002, 94 Daily Journal DAR 5776 (Cal. 1994). Nebraska, in particular, recognizes the concept of the litigation privilege. Prokop v. Cannon, 7 Neb. App. 334, 583 N.W.2d 51, 1998 Neb. App. LEXIS 106 (Neb. Ct. App. 1998). In the present case, in effect, the Union is attempting to punish Virgil and Virginia Anderson for providing what they believed was truthful testimony. Providing testimony cannot be the basis of an unfair labor charge, especially where such testimony is based upon a deposition sought by the Union in litigation the Union has commenced. The Administrative Law Judge should not have based any part of his decision on the deposition testimony of either Virgil or Virginia Anderson. In relying upon such deposition testimony, the Administrative Law Judge committed error.

III. THE UNION CANNOT COMPLAIN ABOUT A FAILURE TO MAKE PAYMENTS WHICH IT INDUCED BY ITS STATEMENTS THAT IT WOULD NOT ACCEPT PAYMENTS

All Virginia and Virgil Anderson testified to on May 20, 2015, was to their beliefs in connection with the suit brought against Anderson Excavating. Their testimony was consistent with the position set forth in Anderson Excavating's Answer to the lawsuit, the Answers to discovery, and the Rule 26(f) Planning Conference Report, which had been submitted by both attorneys to the Court. Nothing new occurred. Nothing surprising took place. The Andersons merely testified as to the position that the company had taken in the case for over one (1) year. In response to that articulated position, the Union indicated it was refusing to accept payments. The Union should gain no added benefit because in response to that testimony the Union suddenly took the position that it was going to refuse payments. Indeed, Virginia Anderson's deposition reflects that the Union's attorney characterized any payments as illegal and the Union advised Anderson Excavating that it would t not accept them. Somehow Anderson's capitulation to the threat that continued payment would be illegal, somehow constitutes her repudiation? The Administrative Law Judge erred in finding that the failure to make payments, which the Union itself asserted it would not accept constituted an unfair labor practice. If there was any breach or default by Anderson Excavating, it was induced by the Union.

ANDERSON EXCAVATING CO.,
RESPONDENT,

/s/ Theodore R. Boecker, Jr.

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Anderson Excavating Co.'s Brief in Support of Exception to Decision was served via email on this the 30th day of September 2016 to the following:

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